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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 74-6593

DANIEL WILBUR GARDNER,

Petitioner,

-v.-

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF FOR PETITIONER

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The body of the Brief for Respondent requires no reply. Appendix "A" thereto requires only the reply that it is not properly before the Court.

Appendix "A" consists of a purported facsimile of "the confidential portion of the presentence report that was furnished to the trial judge at the sentencing phase of petitioner's trial." (Brief for Respondent, at p. 54.) For four independently sufficient reasons, the

Court should "decline to examine" it. Goldberg v. United States, 47 L.Ed.2d 603, 617 n.15 (1976).

First, the Court "must look only to the certified record in deciding questions presented." Lawn v. United States, 355 U.S. 339, 354 (1958). A document which is not in the record "[m]anifestly . . . cannot be properly considered . . . in the disposition of the case." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-158 n.16 (1970). This is true whether or not the document was "used at the hearing in the court below." Bassing v. Cady, 208 U.S. 386, 389 (1908). See, e.g., Ex parte Century Indemnity Co., 305 U.S. 354 (1938). The "rule is common to all courts exercising appellate jurisdiction, according to the course of the common law." Fisher v. Cockerell, 5 Pet. 248, 254 (1831). It has been followed by this Court from the beginning. See, e.g., Ray v. Law, 3 Cranch 179 (1805). In the present case, neither petitioner nor the Court can be assured that Appendix "A" to respondent's brief is an authentic and accurate copy of the undisclosed materials received by the sentencing judge. The question "whether [respondent's] . . . representations [to that effect] are true can be determined only upon a hearing in the [trial court]." Killian v. United States, 368 U.S. 231, 243 (1961).

Second, respondent's invitation to this Court to consider Appendix "A" in the first instance flouts both Florida's and the Eighth Amendment's requirements of procedural regularity for the imposition of a death sentence. Florida law imposes on the Florida Supreme Court the "separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted," Songer v. State, 322 So.2d 481, 484 (Fla. 1975)(footnote omitted), upon review of "the total record," Swan v. State, 322 So.2d 485, 489 (Fla. 1975). "Review of a sentence of death by this Court, provided by Fla. Stat. §921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). This Court, of course, emphasized the Dixon safeguard of automatic, plenary appellate review in sustaining the constitutionality of the Florida capital-punishment statute. Proffitt v. Florida, 49 L.Ed.2d 913, 922, 926-927 (1976) (plurality opinion). See also Gregg v. Georgia, 49 L.Ed.2d 859, 888, 892-893 (1976)(plurality opinion); Jurek v. Texas, 49 L.Ed.2d 929, 937, 941 (1976)(plurality opinion).

Yet the Court is now asked to affirm petitioner's condemnation on the basis of a document that the Florida

Supreme Court has never seen, produced by prestidigitation here following the allowance of certiorari. To do so would denigrate the functions of Florida's highest court in its own capital sentencing system and make an hypocrisy of "the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 49 L.Ed.2d 944, 961 (1976)(plurality opinion). It would also represent a signal deviation from the principles of federalism which commit to the state courts the initial responsibility for administration of their own criminal laws. See, e.g., Younger v. Harris, 401 U.S. 37 (1971).

Third, there is no fair or proper method by which petitioner or the Court can use Appendix "A" for the first time at this stage of the proceedings. The function of a presentence investigation report is to inform and guide the sensitive exercise of discretion in making a choice among available sentences -- here, life or death. The reason for requiring its disclosure under the Sixth and Fourteenth Amendments is to assure the defendant an ample opportunity to be heard regarding all materials considered by the decision-maker before that decision is made.

This Court did not decide to override the trial jury's recommendation of mercy and sentence petitioner to die. It cannot know what influenced the one man who did. It also can-

not know the facts that would have been developed by defense investigation of the factual assertions contained within -- and only within -- the undisclosed portion of the PSI report. 1/ It therefore cannot know the significance

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1/ Respondent's brief asserts that "there is nothing in the confidential portion that is not found in the non-confidential part of the presentence report." (Brief for Respondent, at p. 54.) This is manifestly false even if the text of the confidential portion represented in Appendix "A" is authentic. The "Prior Arrests & Convictions" section of the PSI disclosed at trial, for example, says that two "Assault & Battery" arrests (in 1970 and 1972) were "Dismissed." Neither the identity of the complainant nor the ground of the dismissal of these charges is reported. (A. 135.) Appendix "A" recites that these assaults were "both . . . on the subject's wife" (Brief for Respondent, at p. 58), and proceeds to convict petitioner on the dismissed charges (he "has had at least three times when he has beat on his wife," id. at p. 61), so that the present offense can be summed up by saying "[a]pparently, he beat his wife to an extreme on this occasion" (id. at p. 56). The disclosed portion of the PSI report also notes an "Investigation of Aggravated Assault" arrest in 1960, with the notation "Released" and nothing more. (A. 135.) Appendix "A" notes that this charge "was not able to be verified, due to the fact that the time limit involved [sic]" (Brief for Respondent, at p. 57), but sets forth a 1½ page description of the matter based upon a "volunteered . . . statement" of petitioner to the probation officer who prepared the PSI (id. at pp. 57-58).

Under "Military," the disclosed portion of the PSI reports that petitioner enlisted in the Air Force and served for four years; it says, "Court Martials: None," and records a "General Discharge under honorable conditions." (A. 136.) Appendix "A" recites that petitioner "stated that he did spend some time in the brig, which was mostly due to drinking and disobeying orders." (Brief for Respondent, at p. 60.) Under "Employment," the disclosed portion of the PSI reports: "Subject stated at the time of this incidence [sic] he was unem-

[note 1 continued on following page]

that the sentencing judge would have given to those unknown facts. It cannot even know what significance he assigned to the comments that were contained in the undisclosed portion of the PSI report and thereby insulated against criticism, refutation, or explanation 2/ before he decided "whether this defendant was fit to live," Witherspoon v. Illinois, 391 U.S. 510, 521 n.20 (1968). Affirmance of a decision to take human

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footnote 1, continued/

ployed for approximately two months, but he did get money by doing odd jobs of carpentry around Homosassa. Prior to this he worked for Florida Power Corporation on and off for the past five years, as a carpenter." (A. 136.) The version in Appendix "A" is: "Subject does have a trade as a carpenter, but apparently only works when he feels too [sic]. Florida Power indicated that he had worked on and off for the past five years, but apparently was laid off, mostly due to his drinking." (Brief for Respondent, at p. 60.)

2/ As represented by respondent in Appendix "A," this portion of the report contains such comments as: "[m]ost of the feelings in this case are against the subject" (Brief for Respondent, at p. 61); "[t]his subject has resided most of his life in the Homosassa area, being considered the usual drinker and fighter" (id. at p. 59); and "Apparently, beat his wife to death over no apparent reason" (ibid.).

life should obviously not be rested upon speculation as to what petitioner or his trial counsel might or might not have responded, and how the sentencing judge might or might not then have reacted, if these materials had been disclosed prior to sentencing instead of after judgment.

Fourth, such speculation is not merely improper but impossible in a death case. Respondent's position, apparently, is that nondisclosure of the so-called "confidential" portion of the PSI 3/ was, at worst, harmless error. But "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). Where death has been decreed after proceedings infected by error, it has not been the practice of this Court lightly to dismiss reasonable doubts of harm. See, e.g., Hamilton v. Alabama, 368 U.S. 52, 55 (1961); Boykin v. Alabama, 395 U.S. 238 (1969). Other courts, of course, show the same solicitude, see, e.g., People v. Terry, 61 Cal.2d 137, 37 Cal. Rptr. 605, 390 P.2d 381, 392 (1964); People v. Johnson, 284 N.Y. 182, 30 N.E.2d 465, 466 (1940); People v. Crump, 5

3/ If Appendix "A" is to be believed, there is in fact nothing in the "confidential" portion of the PSI that was confidential in any other sense than that the judge (or the probation officer) decided that it should not be disclosed to petitioner.

Ill.2d 251, 125 N.E.2d 615, 625 (1955), and have for centuries, see 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 83-106 (1948). Where error infects the capital sentencing process itself, the reason for this solicitude is not merely the enormity of what is at stake. It is also that a discretionary decision to take or spare life -- here, a decision to take life notwithstanding the advisory recommendation of the trial jury that petitioner's life should be spared -- always involves "the weighing of imponderables," Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365, 368 (1975), so that the slightest and most unfathomable of influences may tip the delicate balance of life and death. See, e.g., Pait v. State, 112 So.2d 380, 385-386, 388-389 (Fla. 1959); People v. Hamilton, 60 Cal.2d 105, 32 Cal. Rptr. 4, 383 P.2d 412, 430-432 (1963); Stain v. State, 273 Ala. 262, 138 So.2d 703, 707 (1961).

Surely it is true of judges too, as the California Supreme Court has said of jurors, that "[t]he precise point which prompts the [death] penalty in the mind of [a capital sentencer] . . . is not known to us and may not even be known to him." People v. Hines, 61 Cal.2d 164, 37 Cal. Rptr. 622, 390 P.2d 398, 402 (1964). Can this Court say with confidence why the sentencing judge overrode the jury's recommendation of

life imprisonment and sentenced petitioner to death? If it cannot do so, it cannot conclude that nondisclosure of a portion of the PSI was harmless; and -- quite apart from the manifest impropriety of going outside the record -- respondent's invitation to the Court to make "[a] fair appraisal of both the confidential and the non-confidential portions of the presentence report" (Brief for Respondent, at p. 54)(emphasis added) is a contradiction in terms.

Respectfully submitted,

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